SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INDEX NO. 156503/2016

DEFIN LEMA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

285 RIVERSIDE DRIVE CORP., and MAXWELL KATES BROKERAGE, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71,72, 73, 76, 77, 78, 79

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, plaintiff moves for summary judgment as to liability. Defendants oppose the motion and cross move for summary judgment dismissing the complaint. Plaintiff opposes the cross motion.

Background

Plaintiff alleges that he slipped and fell on the morning of July 21, 2015, on the exterior staircase of a cooperative apartment building located at 285 Riverside Drive, New York, NY (the "Building"), which is owned by defendant 185 Riverside Drive Corp. ("Riverside") and managed by defendant Maxwell Kates Brokerage, Inc. ("Maxwell").

At the time of the accident, plaintiff, along with other workers employed by the non-party construction company to renovate a residential apartment in the Building. Plaintiff testified that the accident occurred on the exterior metal staircase which leads from the Building's entrance to the service elevator in the basement, and that he was the first worker to descend the stairs (Plaintiff's Dep., NYSCEF # 61, at 25, 33-34). According to plaintiff, he took one step down from the landing on the first stair and his shoe slipped on water; that he was about to hold onto the handrail when his right foot slipped on the water; and that he fell backwards sliding down approximately six steps before landing on his backside *(id.* at 35-38). Plaintiff testified he did not see water on the stairs before he fell and that

he later learned that a worker employed by the Building had "dropped that water" on the steps before plaintiff and that other workers arrived (*id.* 34-35, 37). He did not observe any signs in the area indicating that the floor was wet (*id.* at 40). After plaintiff fell, he was taken to the hospital by ambulance (*id.* at 39). The accident was witnessed by plaintiff's brother and two other co-workers *(id.* at 38-39).

Nezad Feratovic testified that he is employed by Maxwell as a porter for the Building; that he was working at the Building on the accident date; and that he hosed down the stairs at approximately 7:10 am or 7:15 am (Feratovic Dep., NYSCEF # 64 at 7-8, 21-22). When asked about the condition of the steps at the time of the accident, he testified that "they were not totally dry" (*id.* at 23). Upon viewing photographs taken by plaintiff's brother immediately after the accident, he testified the steps were "partially damp," "partially dry, but damp," and that "some spots were wet" (*id.* at 25-26; NYSCEF # 63). According to Feratovic, at the time the accident, he was standing approximately six feet away at the bottom of the stairs and heard plaintiff fall (*id.* at 29-30). After the accident, Feratovic completed an accident report dated July 21, 2015 at 7:15 am. The report stated that "Delfin Fernando Lem[a] slip[ped] from top steps slide down on back. Stairs were washed and slightly wet" (*id.* at 31).

Plaintiff moves for summary judgment as to liability, asserting that the record establishes defendants created the wet condition of the stairs which caused plaintiff to fall and that the condition was not "open and obvious." In support of his motion, plaintiff submits his affidavit in which he states that no one told him that the steps were wet and that he did not see the water on the steps before he fell (NYSCEF # 62, ¶ 4). Plaintiff also relies on photographs taken of the stairs by his brother as well as his brother's affidavit whose version of the accident is consistent with that of the plaintiff, including that he did not observe the wet condition of the stairs before plaintiff fell (Affidavit of R. Lema, NYSCEF # 63).

Defendants oppose the motion and cross move for summary judgment dismissing the complaint, asserting that the record establishes that the stairs on which plaintiff fell was free from any defects and safe for normal use. In support of its cross motion, defendants submit the affidavit of Kelly Scott, an engineering expert who opines that at the time of plaintiff's fall the subject stairwell was properly designed and constructed and considered slip resistant when wet according to the American National Standards Institute (NYSCEF # 73 ¶¶ 6-10). Defendants also argue that the moisture condition of the stairway does not give rise to a negligence claim. As for Maxwell, defendants argue that as the Building's managing agent pursuant to a contract with Riverside, it does not owe plaintiff a duty of care, in the absence of evidence that it assumed Riverside's nondelegable duty to maintain the Building in a safe condition.

Plaintiff opposes the cross motion, arguing, *inter alia*, that the affidavit of defendants' expert is conclusory and that Maxwell is subject to liability based on its employment of the porter who created the wet stairway and thus "launched the instrument of harm" (citing *Ramsey v Temco Serv. Indus. Inc.*, 179 AD3d 726, 727-728 [2d Dept 2020]).

Discussion

"[O]n a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial" (*Bendik v Dybowski*, 227 AD2d 228, 228 [1st Dept 1996] [internal citations omitted]). Notably, summary judgment is "rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question of fact in all but the most egregious cases" (*Johannsdottir v Kohn*, 90 AD2d 842,842 [2d Dept 1982]).

"It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk" (*Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275, 275 [1st Dept 2005] [internal citations omitted]). "In order to recover damages for breach of this duty, a party must establish that the [landowner] created, or had actual or constructive notice of the hazardous condition which precipitated the injury" (*id.* [internal citations omitted]).

Here, evidence that the porter hosed down the stairs in the morning before the accident and that plaintiff slipped on moisture on the stairs raises triable issues of fact as to defendants' negligence (*see Irizarry v 1915 Realty LLC*, 135 AD3d 411 [1st Dept 2016] [finding that triable issue of fact existed precluding summary judgment based on evidence that defendant caused or created wet stair condition]). In this connection, the opinion of defendants' expert that the stairs were properly designed, configured and were slip-resistant does not eliminate issues of fact as to whether defendants breached their duty of care in connection with the hosing down of the subject stairway and thus creating the condition that caused plaintiff to fall. At the same time, summary judgment in plaintiff's favor is not warranted as issues of fact exist including related to whether defendants breach their duty of care (*see Ugarriza v Schmeider*, 46 NY2d 471, 475 [1979] ["when the suit is founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's

conduct either was not really involved...or was clearly of exemplary prudence in the circumstances "][internal citations and quotations omitted]).

As for defendants' argument that Maxwell, as the managing agent, cannot be held liable to plaintiff based on its contractual relationship with Riverside, the court notes that, in general, a contractual obligation is insufficient to rise to tort liability (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Howard v Alexandra Restaurant*, 84 AD3d 498 [1st Dept 2011] [granting summary judgment to managing agent of restaurant where plaintiff fell]). However, in this case, the record raises triable issues of fact as to Maxwell's liability based on evidence that its employee, the porter, was responsible for creating the wet condition on the stairs (*see Farrugia v 1140 Broadway Assoc.*,163 AD3d 452, 455 [1st Dept 2018] *appeal withdrawn*, 32 NY3d 1168 [2019] [finding that summary judgment was not warranted in contractor's favor when contractor failed to show "it did not cause, create or exacerbate a dangerous condition"];*Ramsey v Temco Serv. Indus. Inc.*, 179 AD3d at 727-728 [reversing trial court's decision granting summary judgment to defendant cleaning contractor in light of factual issues as to whether the defendant "launched an instrument of harm" based on evidence that its employee placed the wet floor signs in area where plaintiff did not see them]). Accordingly, Maxwell is not entitled to summary judgment.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is denied.

3/8/21
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED	x	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE